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No. 98-582

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

HOLLY GOTTFRIED,
Petitioner,

v.

MEDICAL PLANNING SERVICES, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

This case presents no conflict among the circuits and no departure from the established precedents of this Court. There is no occasion for review.

The Sixth Circuit Court of Appeals followed the sound decisions reached in Hoover v. Wagner, 47 F.3d 845 (7th Cir. 1995) and McKusick v. City of Melbourne, Fla., 96 F.3d 478 (11th Cir. 1996), as well as policies clearly established by recent precedent of this Supreme Court. It affirmed abstention by the United States District Court for the Northern District of Ohio from a challenge to a state court injunction regulating abortion-related picketing activity. The Sixth, Seventh and Eleventh Circuits are consistent in their decisions—refusing to permit the federal courts to be converted into super-appellate courts to review, enjoin and sanction state court judges for their prospective exercise of judicial authority in the enforcement of facially constitutional injunctions. There are no circuit decisions to the contrary.

In suggesting that the decision of the Sixth Circuit is an aberration requiring review, Petitioner has mischaracterized that decision as an application of Pullman abstention, Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), but the Sixth Circuit did not apply Pullman. Petitioner has strikingly failed to provide this Court with the relevant and applicable legal precedent—completely omitting any mention of the Hoover decision in its Petition. Petitioner has also completely omitted any reference to this Court's relevant abstention precedent, recently set forth in Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 116 S. Ct.

1712, 135 L. Ed. 2d 1 (1996), and previously in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987). Petitioner has likewise distorted the 11th Circuit's decision in McKusick, obscuring the relevant holding of that case to suggest that the decision supports her position, which it emphatically does not.

Petitioner has also mischaracterized and misrepresented the legal and factual record—claiming that the "facial unconstitutionality" of the state court injunction was conceded. The record below is clearly to the contrary—the District Court implicitly found that the order was *not* facially unconstitutional. That conclusion was not appealed by Petitioner to the Sixth Circuit, which also recognized that the state court injunction was not facially unconstitutional.

Although Petitioner suggests that the decision by the Court of Appeals presents this Court with the opportunity to address issues that she claims have been reserved in previous decisions, those issues were not presented to the District Court or to the Court of Appeals. The record therefore does not permit this Court to consider such issues on certiorari review.

Petitioner's Claims For Relief

Petitioner Holly Gottfried ("Gottfried") brought this federal action for injunctive and declaratory relief. She challenges the propriety of an injunction ("the State Court Order") entered on August 7, 1986, by the Summit County, Ohio, Court of Common Pleas in Medical Planning Services, Inc. v. Tri-County Christian Community of Greater Akron, Case No. CV 85-1-0282 by the Honorable James Winter.

Gottfried sought a declaration that the State Court Order was facially unconstitutional and unconstitutional as applied. She sought an injunction enjoining the defendants, including the Honorable Jane Bond who succeeded to Judge Winter's seat on the bench, from enforcing the State Court Order. Of critical importance, Gottfried sought an award of compensatory damages in the amount of $100,000.00 against each defendant, including Judge Bond, an award of punitive damages in the amount of $100,000.00 against each defendant, again including Judge Bond, and an award of attorneys' fees and costs, all pursuant to the provisions of 42 U.S.C. § 1988.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Did Not Apply Pullman Abstention, So Review Of This Decision To Ensure Its Conformity With The Principles Of That Doctrine Is Unnecessary.

Petitioner claims that the decision by the Sixth Circuit is an aberrant application of the Pullman abstention doctrine. She does so in order to urge certiorari review, suggesting that the decision by the Sixth Circuit represents a significant departure from established precedent and creates a conflict among the circuits. But the Sixth Circuit did not decide this case under the Pullman abstention doctrine and therefore the urgent suggestions that this Court's prior precedents are being disregarded is without merit.

There is absolutely no doubt that the Sixth Circuit did not apply Pullman—and understood that it was not applying

Pullman—when it decided this case. In fact, the Court of Appeals began its analysis by noting, "Gottfried's lawsuit does not fit easily within any of the doctrines that limit federal jurisdiction." Gottfried v. Medical Planning Services, Inc., 142 F.3d 326, 329 (6th Cir. 1998). After careful consideration, the Court of Appeals found that the earlier abstention doctrines were not applicable. Id. It borders on bad faith to suggest to this Court, despite the Sixth Circuit's clear and unambiguous statements that it was not applying a defined existing abstention doctrine, that this case was nonetheless decided under Pullman.[1]

There is thus no need to review this case to ensure conformity among the circuits in applying Pullman.

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[1] The Sixth Circuit did make passing reference to the comity considerations that underlie the Pullman abstention doctrine as an illustration of the propriety of abstaining until the state court has had an opportunity to act—including the avoidance of unnecessary constitutional determinations and the avoidance of an assumption that a state government official will act unconstitutionally. Gottfried, 142 F.3d at 330-331. However, the Court of Appeals did not apply the Pullman doctrine nor did it alter the Pullman doctrine. The line of cases which this decision joins are *sui generis*, not fitting into a previously defined abstention "pigeonhole," instead building upon the body of abstention doctrine to recognize the unique nature of these injunctions.

II. The Sixth Circuit Followed Decisions By The Seventh And Eleventh Circuits Which Have Concluded Correctly That Federal Courts Should Abstain From Prospectively Enjoining Enforcement Of Facially Constitutional State Court Injunctions.

The Sixth Circuit concluded correctly that earlier abstention doctrines did not apply to this case. However, it also recognized the substantial similarities between the policy considerations that give rise to those abstention doctrines and the issues presented by this case. The Court of Appeals explained:

> **[W]e are concerned about the policies underlying abstention, not its precise limitations.** Therefore, we should keep in mind the Supreme Court's recent advice that "[t]he various types of abstention are not rigid pigeonholes" but instead "reflect a complex of considerations designed to soften the tensions inherent" in a dual state-federal system of justice. (Emphasis added.)

Gottfried, 142 F.3d at 330, *quoting* Pennzoil, 481 U.S. at 11-12 n. 9, 107 S. Ct. at 1526-27 n. 9.

The Sixth Circuit considered the decisions from the Seventh Circuit in Hoover, and the Eleventh Circuit in McKusick. In each case, the Court of Appeals addressed precisely the issue presented by Gottfried—whether a federal court should abstain from issuing injunctions against state

court judges arising out of challenges to facially constitutional state court injunctions that impose limitations on abortion protest activities.

Gottfried does not discuss these cases in her Petition—and that omission is material. In Hoover, McKusick and Gottfried, the respective Court of Appeals carefully considered principles of federalism and comity and concluded that the federal court should abstain rather than enjoin the actions of state court judges where there was no evidence of an actual constitutional deprivation but only concern about how an injunction **might** be enforced. Both the Seventh and the Eleventh Circuit grounded their decisions in this Court's well-established precedents—particularly O'Shea v. Littleton, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974).

In following Hoover and McKusick, the Sixth Circuit did not create any conflict among the circuits but instead joined the growing consensus as to how these cases should properly be addressed. There are no circuit decisions to the contrary. These precedents clearly demonstrate that this Court need not exercise its certiorari power—the evolution of law in the circuits is consistent and in accord with the applicable Supreme Court precedents.

In Hoover, the plaintiff sought to enjoin a state judge and the local police chief in enforcing a state court injunction limiting certain anti-abortion picketing activity. In that case, as here, the plaintiff claimed not to be a party to the original injunction. Judge Posner described the relief sought:

> [The plaintiffs] want the federal court to tell the state judge to rewrite his injunction to make it clearer, to refrain from convicting anybody who does not really and truly violate the injunction as revised, and to tell the police chief and the judge not to infer that people are assisting in violating the injunction from their mere proximity to defendants named in the injunction.

Id., 47 F.3d at 850.

The court noted the significant comity concerns implicated by the request:

> The relief that the plaintiffs seek is at once an insult to the judicial and law enforcement officials of Wisconsin, an interference with an ongoing state court proceeding, and an empty but potentially mischievous command to these officials to avoid committing any errors in the enforcement of the injunction—and if a plaintiff were erroneously convicted for violating the state court injunction, would that put the prosecutor, the judge, and, if there were a jury, the jury in contempt of the federal injunction?

Id. at 850-851.

> [T]he difficulty of framing a useful injunction, when considered in conjunction with the

> affront to comity that such an injunction would constitute and the nebulous and speculative character of the fears that have led the plaintiffs to sue, convinces us that this suit is an inappropriate invocation of the equity powers of the federal courts. . . . [W]e hold that it would be an abuse of discretion, in light of the principles of equity and comity that underlie Younger [v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)], to grant the relief sought by the plaintiffs.

Id. at 851

The Seventh Circuit was particularly troubled by the demand for relief against the state judge, stressing that while such relief may be available under 42 U.S.C. § 1983, it is "to be reserved for 'really extraordinary causes.'" Pulliam v. Allen, 466 U.S. 522, 538, 104 S.Ct. 1970, 1979 (1984).

Judge Posner compared the case before the Seventh Circuit with this Court's decision in O'Shea. He concluded that the Supreme Court's directive in O'Shea, counseling against issuance of injunctive relief against state judicial officers, 414 U.S. at 504, 94 S. Ct. at 679, provided substantial support for the conclusion that the federal court should abstain. Hoover, 47 F. 3d at 851.

In McKusick, the Eleventh Circuit followed the Seventh Circuit's reasoning in Hoover. Petitioner quotes a footnote from McKusick for the proposition that abstention is inappropriate where a statute is attacked on the grounds of

facial unconstitutionality. 96 F.3d at 489, n.6, *citing* Dombrowski v. Pfister, 380 U.S. 479, 489-490, 85 S. Ct. 1116, 1122, 14 L. Ed. 2d 22 (1965), *as quoted in* City of Houston, Tex. v. Hill, 482 U.S. 451, 467, 107 S. Ct. 2502, 2513, 96 L. Ed. 2d 398 (1987). However, this is not the holding in McKusick where, as here, there is a facially constitutional injunction at issue. The Eleventh Circuit held in McKusick that:

> [P]rivate interests in obtaining a preemptive strike against overenthusiastic enforcement of a facially valid injunctive order must yield to the institutional interests of federalism and comity.

Id., 96 F.3d at 489.

The Eleventh Circuit concluded, as had the Seventh, that declaratory and injunctive relief against a facially constitutional injunction restricting abortion protest activity would pave the way for an endless succession of federal lawsuits. The Eleventh Circuit discussed the inevitable result of such federal intervention in state court proceedings:

> This arrangement would thrust the federal court into an unseemly, repetitive, quasi-systematic, supervisory role over administration of the state court injunction, and it "would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*."

Id. at 488, *quoting* O'Shea, 414 U.S. at 501, 94 S. Ct. at 678-79. The court continued:

> A federal court injunction in this case would be of the "intrusive and unworkable" variety condemned by the Supreme Court in O'Shea, 414 U.S. at 500, 94 S.Ct. at 678. In such a circumstance, principles of federalism and comity dictate that the federal court stay its hand. *See* Growe v. Emison, 507 U.S. 25, 32, 113 S.Ct. 1075, 1080, 122 L.Ed.2d 388 (1993) (noting that, in some circumstances, principles of federalism and comity dictate abstention). Under these circumstances, the district court certainly did not abuse its discretion by declining to arrogate to itself the role of overseer of the enforcement of a state court injunction.

McKusick, 96 F. 3d at 488.

The Sixth Circuit was equally concerned by the threat that federal challenges to facially constitutional state court injunctions would pose to the orderly relationship between state and federal courts.

> Treating an injunction like a statute, those who want to exercise their speech rights but do not wish to violate the injunction often file suit in federal court against a host of state and local officials for every imaginable constitutional violation, rather than simply asking the state judge who has ongoing jurisdiction over the

> matter for relief. This has become the pattern in today's litigious era, and it causes a host of problems that only multiply where, as here, the law has changed in the interim and a new state judge has inherited a permanent injunction drafted by a predecessor.

Gottfried, 142 F.3d at 330.

The Sixth Circuit noted that the decisions in Hoover and McKusick recognize that the strong state interest in these injunctions, which serve to prevent expressive conduct from degenerating into violence, is best served by permitting a state court the first opportunity to consider the scope of the injunction and its constitutional ramifications. Gottfried, 142 F.3d at 331. Principles of equity, comity and our federalist judicial system require the federal court to give the state judge the first chance, if necessary, to bring the injunction into compliance with constitutional law.[2]

The Sixth Circuit, in following Hoover and McKusick, struck the right balance between the proper roles of the state and federal courts and avoids usurpation of the role of the state courts to oversee their own orders. It follows in the well-established

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[2] Indeed, the Supreme Court has stated that the preferable means to challenge the constitutionality of a state court injunction, and to avoid unnecessary federal involvement, is to ask the state court for relief from the injunction before disobeying it. Walker v. Birmingham, 388 U.S. 307, 317-19, 87 S. Ct. 1824, 1830-31, 18 L. Ed. 2d 1210 (1967).

tradition of respect for federal-state comity and requires no further review.

III. The Decision By The Sixth Circuit And The Decisions By The Seventh And Eleventh Circuits Are Consistent With This Court's Applicable Precedents Mandating Abstention.

The Sixth Circuit looked to this Court's own authorities to confirm its conclusion that abstention was proper in the circumstances before it. In Quackenbush, *supra*, this Court held that the duty of a federal court to exercise its jurisdiction is not absolute and that a federal court may decline to exercise its jurisdiction where to do so would serve an important countervailing interest, such as where abstention is warranted by considerations of "regard for federal-state relations," or "wise judicial administration." Id., 517 U.S. at 716, 116 S. Ct at 1720-1721. Precisely those concerns were implicated here.

The decisions in Hoover and McKusick, which the Sixth Circuit elected to follow, were expressly based on this Court's well-developed abstention jurisprudence, particularly this Court's decision in O'Shea, *supra*.

In O'Shea, this Court reviewed a decision that had granted respondents' request for injunctive relief against various state court judicial officers. The respondents sought an injunction to bar the petitioners from engaging in what respondents described as a pattern of unconstitutional conduct in setting bond, sentencing and jury fee practices in criminal cases. As an initial matter, the Supreme Court found that the plaintiffs in O'Shea lacked standing. The Court went on to address the

equitable relief that had been granted to respondents. This Court initially noted that the principles of Younger, *supra*, would apply, limiting the authority of a federal court to intervene. The court continued:

> [R]ecognition of the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is "both great and immediate." In holding that 42 U.S.C. § 1983 is an act of Congress that falls within the 'expressly authorized' exception to the absolute bar against federal injunctions directed at state court proceedings provided by 28 U.S.C. § 2283, the Court expressly observed that it did not intend to 'question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.' Those principles preclude equitable intervention in the circumstances present here. (Citations omitted.)

O'Shea, 414 U.S. at 499, 94 S. Ct. at 678. The Court concluded that it would be improper to issue an injunction that would require the federal court to supervise the state court judge. Id., 414 U.S. at 501, 94 S. Ct. at 679.

The concerns of federalism and comity express in O'Shea have continued to guide this Court's consideration of relief

sought in federal courts against state court judges. In Pulliam, *supra*, this Court reaffirmed the validity of the principles of federalism and comity and the need for restraint by federal courts called on to enjoin the actions of state judicial officers. 466 U.S. at 539, 104 S. Ct. at 1979.

The injunction sought by Petitioner would have precisely the effect that this Court seeks to avoid. If the state court is enjoined, then any subsequent state court action with respect to picketing activity at the Medical Planning clinic would be subject to review for violation of that injunction. The federal district court would therefore become, as a practical matter, an appellate court with special authority to review—and sanction—the state court judge in the legitimate exercise of her authority.

The principles of comity and federalism have equally strong application where this Petitioner seeks money damages from respondents. Petitioner's claim for money damages required that the federal court assume that the state court judge would act in an unconstitutional manner and therefore based upon these assumptions, Petitioner was entitled to money damages.

The decision by the Sixth Circuit conforms with this Court's frequently expressed concern that federal court's apply the principles of comity and federalism to demonstrate appropriate respect for the authority of state court. There is no occasion for review.

IV. The State Court Order is Not Facially Unconstitutional

Petitioner has claimed that the facial unconstitutionality of the State Court Order was conceded. Petition, p. 11. That is a complete misrepresentation of the legal and factual record below.

The District Court did not make an express finding of the facial constitutionality of the State Court Order. However, the District Court had previously concluded correctly that the State Court Order was, at the very least, facially constitutional. In an Order entered by the District Court on September 18, 1996, the District Court denied leave to the Medical Planning Defendants to amend their answer in order to make it clear that those defendants would not seek to enforce the State Court Order in an unlawful manner. The District Court, noting that Gottfried had alleged the facial invalidity of the State Court Order, went on to state that the Medical Planning Defendants would indeed be able to legitimately attempt to enforce that order, thus assuming its facial constitutionality. Order, p. 3, Respondent's Apx. 3a. ***This conclusion was not appealed to the Sixth Circuit by Petitioner.***

The Sixth Circuit likewise implicitly concluded that the State Court Order was facially constitutional, never having been asked to address the issue directly. In directing that Petitioner should seek initial relief in the state courts, it stated:

> The state court responsible for the injunction is familiar with local conditions and transportation patterns and is in a better position to

> accommodate Gottfried's constitutional rights through modification or narrow construction of its injunction. This result is more effective and less contentious than asking a federal court to enjoin a state court or to declare its injunctions unconstitutional.

Gottfried, 142 F.3d at 333. Such considerations are relevant only if the State Court Order is facially constitutional, and relate to the question of its constitutionality as applied.

Petitioner also claims that the State Court Order binds the world. It provides, in pertinent part, that it applies to "any and all persons acting in concert or participation with them and all other persons to whom notice of this order shall come." The State Court Order satisfies the dual requirements of Ohio Rule of Civil Procedure 65 concerning the order's application to persons that are acting in concert or participation with the State Court Defendants and the requirement that such persons have actual notice of the State Court Order.[3] *See* Planned Parenthood v.

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[3] Although Gottfried claims in her Petition that "She is acknowledged to be a stranger to the injunction," Petition, p. 5, that point is vigorously contested. The factual record clearly reflects that Gottfried is nothing more than a "straw" plaintiff, advancing the interests of anti-abortion groups that were parties to the original action. She was used to advance their dual purposes—to obtain a federal court order setting aside the injunction to which they initially agreed and, at least equally important, to obtain an award of substantial money damages and an award of attorneys fees. The District Court expressly made numerous findings relating to Petitioner's lack of actual involvement in "her" lawsuit. December 1996 Opinion, ¶¶ 46-52,

Project Jericho, 52 Ohio St. 3d 56, 61 (1990). Only by reading the phrase "persons to whom notice of this order shall come" out of its context in the order as a whole is it possible to interpret that phrase as extending the order to the entire world. This is inconsistent with Petitioner's arguments made to the District Court that the State Court Order constituted a viewpoint-based restriction because it applied solely to anti-abortion activists.

Moreover, Petitioner's claim that the scope of those bound by the State Court Order makes it facially unconstitutional is without merit. In McKusick, *supra*, the Court of Appeals noted that while there was case law that held that a court lacks **equitable** power to issue an injunction that binds the world at large, that is an equitable principle and does not render the injunction unconstitutional. Id. at 485. The federal courts are not guardians of separation of powers within the states and therefore such equitable principles do not give rise to an overbreadth argument. Id.

V. A Federal Court Is Not Barred From Abstaining Where An Action Arises Under 42 U.S.C. § 1983, Even Where First Amendment Challenges Are Raised.

Petitioner claims that the district court was barred from abstaining because she claims that the State Court Order is

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Petitioner's Apx. 27-29. In particular, the District Court did not find that Petitioner was not in privity with the defendants in the state court action. Rather, the District Court found only that "Holly Gottfried was not a named party to that action." ¶¶ 8, Petitioner's Apx. 19.

facially unconstitutional. However, even assuming as true the incorrect assumption of facial unconstitutionality, the cases which she cites have merely held that where a restriction on speech is facially invalid, a federal court **need not** abstain to permit a state court to interpret the statute or ordinance in question. Dombrowski v. Pfister, 380 U.S. 479 (1965); City of Houston, Texas v. Hill, 482 U.S. 451 (1987). None stand as an absolute bar to abstention on the particular facts and circumstances presented here, where the federal court possesses the **discretion** to abstain. State courts are fully competent to decide issues of federal constitutional law. Martin Marietta Corp. v. Maryland Commission on Human Relations, 38 F.3d 1392, 1396 (4th Cir. 1996), *discussing* Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986).

In this case, the Court of Appeals properly concluded that the state court should be provided with a first opportunity to apply and interpret the State Court Order in order to avoid, if possible, any constitutional issues. Gottfried, 142 F.3d at 332. The age of this injunction and the change in the holder of the judicial seat gives rise to a unique circumstance—it is not possible to make an assumption about how this state court would apply or limit the injunctive language at issue.

VI. The Sixth Circuit's Decision Is Consistent With This Court's Decision In Ohio Civil Rights Commission And Does Not Impose An Impermissible Exhaustion Requirement.

Petitioner claims that the Court of Appeals has improperly imposed an exhaustion requirement upon her in

violation of this Court's decision in Patsy v. Board of Regents, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982). However, Petitioner's reliance on Patsy is misplaced. In Patsy, this Court concluded that it was not necessary for a plaintiff to exhaust state administrative procedures where such procedures would not permit her to present her constitutional claims.

Petitioner has not cited or discussed this Court's decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986). In that case, this Court expressly distinguished and limited Patsy, holding that the concern for comity and federalism expressed in Younger, *supra*, is also applicable to state administrative proceedings. In that case, the Supreme Court ruled that a federal court did not err in abstaining so that a state administrative proceeding could go forward so long as any constitutional issues could be raised in subsequent state court proceedings reviewing the administrative determination.

The Sixth Circuit correctly determined that requiring Petitioner to seek relief from the state courts did not preclude her from ultimately obtaining federal relief. However, the court also recognized that, as in Ohio Civil Rights Commission, Petitioner would have an opportunity to bring her constitutional claims. Unlike Patsy, where abstention in favor of the completion of a state administrative review would not eliminate the need for a federal court to ultimately redress constitutional claims, the Sixth Circuit recognized that by going first to state court, it was possible that a constitutional adjudication could be avoided. Gottfreid, 142 F. 3d at 332.

The Sixth Circuit's decision to stay proceedings pending

further proceedings in state court is in accord with this Court's decision in Ohio Civil Rights Commission and no further review is necessary.

VII. Petitioner Is Not Barred From Seeking Relief In The Ohio Courts.

Petitioner claims that she is barred from obtaining relief from the state courts. However, that conclusion is incorrect as a matter of fact and law. It is clear that Petitioner is entitled to seek relief from the state courts.

If Petitioner is, as she claims, bound by the State Court Order, she is entitled to seek relief pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure. *See* State ex rel. Dayton v. Kerns, 49 Ohio St. 2d 295 (1977). Ohio case law confirms that Petitioner is able to obtain relief in the Ohio courts, either by way of prohibition or by means of general declaratory relief from the injunction pursuant to Ohio Rev. Code §§ 2721.01, *et seq.* Gottfried, 142 F.3d at 332. Such relief would be complete and adequate, but Petitioner would not be entitled to recover money damages and attorney fees under 42 U.S.C. §§ 1983 and 1988.

In claiming that a writ of prohibition is the only form of relief available, Petitioner has distorted the holding of the Ohio Supreme Court in State ex rel. News Herald v. Ottawa County Court of Common Pleas, 77 Ohio St. 3d 40 (1996). The Ohio Supreme Court's decision was limited to the special situation of court closure orders:

> There is a long line of cases holding that an action for a writ of prohibition is the proper

> vehicle to challenge an order of a trial court which orders closure of court proceedings. In fact, historically, it has been held that prohibition is the *only* remedy available to nonparties who wish to challenge an order which restricts the rights of free speech and press of such nonparties. (Emphasis in original.)

Id. at 43, *citing* State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457 (1976), In re T.R., 52 Ohio St. 3d 6, *cert. denied* 498 U.S. 958, 111 S. Ct. 386, 112 L. Ed. 2d 396 (1990).

In fact, this court has analyzed such a writ as analogous to the relief Petitioner has indeed sought—a federal court injunction. *See*, Pulliam, *supra*, 466 U.S. at 529, 104 S. Ct. at 1974.

Respondents are now clearly estopped from challenging Petitioner's right to obtain relief in state court in an appropriate proceeding. In the unlikely event that the Common Pleas Court were to *sua sponte* deny her leave to intervene, she would then clearly have a right to return to the District Court where her action has been stayed, and seek relief based on the actual failure of a state court to protect her constitutional rights. Only then would she be entitled to seek money damages and attorneys' fees. If Petitioner's attorney, who in this case clearly controls this litigation, had been legitimately interested in relief, it would have been a very simple matter to have sought leave to intervene in the State Court action during the four years that this action has been pending. Instead, Petitioner has insisted that she has no right to go to state court simply because she says it is so and has

affirmatively refused the numerous invitations to try.

VIII. Petitioner Seeks Review Of Questions That Were Not Before The Court Of Appeals.

Gottfried seeks consideration of four issues that were not addressed in the decision of the Sixth Circuit Court of Appeals or by the District Court. Those issues are set forth in her third through sixth questions presented for review, as follows:

> 3. Should a federal court invoking Pullman abstention be permitted to stay a § 1983 action involving a facially unconstitutional state provision, which is causing an immediate deprivation of First Amendment rights, without first considering whether preliminary injunctive relief is required?
>
> 4. May a court issue an injunction that expressly binds the entire world?
>
> 5. Should an injunction that expressly binds the general public be treated as a statute?
>
> 6. Should a court be permitted to issue a complete ban on picketing on a public sidewalk in a non-residential setting?

In light of the decision by the Court of Appeals to affirm the District Court's decision to abstain, these questions were never decided by the Court of Appeals. More importantly, it is clear

from a review of Petitioner's Appellant's Brief, filed below, that these four questions were not before the Court of Appeals.

Rule 28(a)(3) of the Federal Rules of Appellate Procedure provides that the appellant's brief must contain "a statement of the issues presented for review." In the Appellant's Brief, filed pursuant to that rule, Gottfried identified the issues that she presented to the Court of Appeals for its review.

1. Did the District Court err in dismissing this case on comity and abstention grounds.

2. Did the District Court err in dismissing this case on comity and abstention grounds in favor of state court proceedings where there were no proceedings pending in state court (the litigation having been terminated by final judgment more than ten years earlier).

3. Did the district court err in dismissing this case on comity and abstention grounds where Plaintiff was never a party to the state court proceedings.

4. Did the District Court err in dismissing this case on comity and abstention grounds, so as to require Plaintiff to exhaust state remedies.

5. Did the district court err in dismissing this case on comity and abstention grounds, on the basis that Plaintiff must "intervene" in state court.

Petitioner's appeal thus was focused precisely on the issue of abstention which the Court of Appeals directly addressed. Neither the District Court nor the Court of Appeals was ever asked to address the propriety of preliminary injunctive relief during the pendency of a stay. Although Petitioner raised challenges to the terms of the injunction in the District Court, *she did not request that the Court of Appeals review those issues.*

"Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." Pennsylvania Dept. of Corrections v. Yeskey, ____ U.S. _____, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215 (1998), *quoting* Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n.2, 90 S. Ct. 1598, 1602, n.2, 26 L. Ed. 2d 142 (1970) (citations omitted). *See also*, Ohio Forestry Assn., Inc. v. Sierra Club, ____ U.S. _____, 118 S. Ct. 1665, 1673, 140 L. Ed. 2d 921 (1998), Capital Square Review and Advisory Board v. Pinette, 515 U.S. 753, 760, 115 S. Ct. 2440, 2444, 132 L. Ed. 2d 650 (1995).

Thus, this Court refused to consider whether the respondents in Bray v. Alexandria Women's Health Center, had established a claim that actions by anti-abortion protesters hindered the giving or securing of equal protection of laws so as to violate 42 U.S.C. §1985(3). 506 U.S. 263, 279, 113 S. Ct. 753, 764, 122 L. Ed. 2d 34 (1993). The Court declined to reach the question where neither the district court nor the court of

appeals considered the application of that law to the particular facts. Id.

In this case, because the District Court and the Court of Appeals properly decided to abstain, neither court reached the questions which Petitioner urges this Court reach.

The record does not permit this Court to review any finding by the lower courts on these four issues presented by Petitioner. Instead, this Court would be required to make an initial determination of the law on these issues. Further, because of the District Court's decision to abstain, the findings of fact do not permit a reviewing court to evaluate the propriety of the particular terms of the State Court Order.

Thus, this Court should decline to review questions that were not presented below and are not postured for review by this Court.

CONCLUSION

Review is neither necessary nor appropriate. The Sixth Circuit has adhered to this Court's oft-stated dictate that a federal court must pay due respect to the authority and capabilities of a co-equal state court. It has wisely avoided undue interference with the operations of a state court in the enforcement of its own orders and has stayed, but not denied, federal relief to Petitioner unless and until an actual need for such relief is shown.

Respectfully submitted,

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RESPONDENT'S APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Holly Gottfried,	)	CASE NO.: 5:95 CV 1569
	)	
Plaintiff,	)	
	)	ORDER
v.	)	
	)	(Resolving Docket No. 61)
Medical Planning	)	
Services, Inc., et al.,	)	
	)	(Filed Sept. 18, 1996)
Defendants.	)	

Before the Court is defendants' motion for leave to file a second amended answer (Docket No. 61) and plaintiff's memorandum in opposition to the motion (Docket No. 62). For the reasons discussed below, the motion is denied.

Plaintiff is a college-age woman who has filed this action under 42 U.S.C. § 1983 seeking injunctive relief enjoining the defendants from enforcing certain provisions of a permanent injunction entered by the Summit County Court of Common

Pleas on August 7, 1986 (when plaintiff was approximately 10 years old) in a case styled Medical Planning Services, Inc. v. Tri-County Christian Community of Greater Akron (Case No. CV 85-1-0292). Plaintiff claims that the state court injunctive order is unconstitutional on its face and as applied to her. Among the allegations of the Complaint are the following:

> 20. Further, the defendants, Medical Planning Services, Inc., Manohar Lal, and the Offices of Manohar Lal, M.D., intend to enforce and will enforce the state court order against plaintiff to prevent her from engaging in the constitutionally protected and lawful activities set forth above.
>
> 21. Unless and until defendants are restrained by order of this Court, defendants or their employees and agents will enforce the state court order.
>
> 22. Unless and until this Court restrains enforcement or declares the state court order unconstitutional, defendants or their employees and agents will continue to enforce it.

(First Amended Verified Complaint, Docket No. 21)

Initially, the defendants filed their Answer, followed by their First Amended Answer wherein they admitted that they "intend[ed] to seek and will seek the enforcement of the terms of the Permanent Injunction entered on August 7, 1986." Four business days before the commencement of a trial of the case to

the Court,[1] defendants filed the instant motion for leave to file a Second Amended Answer. At the time, the Court saw no need to resolve the motion immediately. However, since it remains on the Clerk's list of pending motions, the Court shall issue its ruling.

Defendants seek to amend three paragraphs of their First Amended Answer by adding the language shown below in bold, underlined type:

> 20. Medical Planning Defendants admit that they intend to seek and will seek the enforcement of the terms of the Permanent Injunction entered on August 7, 1986 **to the extent that it is legally enforceable**. Medical Planning Defendants deny for want of knowledge the remaining allegations set forth in Paragraph 20 of the Complaint.
>
> 21. Medical Planning Defendants admit that they intend to seek and will seek the enforcement of the terms of the Permanent Injunction entered on August 7, 1986 **to the extent that it is legally enforceable**. Medical Planning Defendants deny the remaining allegations contained in Paragraph 21 of the Complaint.

---

[1] The motion was filed on June 25, 1996; the trial commenced on July 1, 1996.

> 22. Medical Planning Defendants admit that they intend to seek and will seek enforcement of the terms of the Permanent Injunction entered on August 7, 1986 **to the extent that it is legally enforceable**. Medical Planning Defendants deny the remaining allegations contained in Paragraph 22 of the Complaint.

(Proposed Second Amended Answer, attached to Docket No. 61). Plaintiff opposes granting leave to further amend the answer on the ground that she would be prejudiced by the eleventh-hour amendment attempt which, in plaintiff's view, would "completely change the position which they [the defendants] have taken in their pleadings since this case was filed."

This Court is of the view that the language sought to be added to paragraphs 20, 21 and 22 of the Answer would add nothing to the case. The First Amended Answer states that the defendants intend to enforce the state court order. It is presumed that such intent to enforce would be only "to the extent that [the order] is legally enforceable." Of course, the defendants might legitimately attempt to enforce a court order and, in the process, be told by another court that the order sought to be enforced is not "legally enforceable." But Fed. R. Civ. P. 11 would prohibit any purposeful attempt by the defendants to enforce an order against the plaintiff to the extent that the defendants themselves believed such order to be legally unenforceable. That would amount to harassment of the person against whom defendants were seeking to enforce the order. This Court concludes that defendants' attempt to add language to paragraphs

20, 21 and 22 of the First Amended Answer cannot possibly mean that, without the added language, defendants would take the view that they could engage in enforcement actions that would be merely harassing, in violation of Fed. R. Civ. P. 11. Therefore, the language is merely surplusage.

Defendants' motion for leave to file a second amended answer (Docket No. 61) is denied.

IT IS SO ORDERED.

/s/_____
David D. Dowd, Jr.
U.S. District Judge